CIMB Bank Bhd (previously known as Cempaka Finance Bhd) v Kamaruddin bin Said (as the administrator of the estate of Said bin Ali, deceased) & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS K-02(NCVC)(W)-1772–08 OF 2017 AND K-02(NCVC)(W)-1771–08 OF 2017
VERNON ONG, HARMINDAR SINGH AND HANIPAH FARIKULLAH JJCA
13 JUNE 2019

Land Law — Lienholder's caveat — Third-party charge — Bank created lienholder's caveats over lands of individuals to secure loans given to third-party borrower — Borrower defaulted and was wound up — Bank sought to enter judgment against landowners for amount due under loans before proceeding to obtain order for sale of lands — Whether the 'judgment' under s 281(2) of the National Land Code in this instance referred to judgment against the borrower and not the landowners as they were not parties to the loan agreement nor had any privity of contract with bank — Whether bank had no cause of action to allow it to enter judgment against the landowners

The respondents — who comprised landowners, administrators of deceased landowners and a trustee — were among seven persons sued by the appellant in the High Court for the enforcement of lienholder's caveats ('LHC') favouring the appellant to secure loans it had granted to a third-party ('Ikaz'). Following Ikaz's default in repaying the loans, and its subsequent winding up, the appellant entered judgment in default against the other three defendants, sold off their lands which were subject to LHC and sought to enter judgment against the respondents for the balance due under the loans in order to obtain an order for sale of their lands. The High Court ('the JC') dismissed the appellant's prayer for judgment, holding that the judgment that the appellant was required to obtain under s 281(2) of the National Land Code ('the NLC') was, in this case, against Ikaz, and not against the third-party respondents/landowners. The JC allowed the second respondent's counterclaim to expunge the appellant's LHC on the share of land held by the second respondent ('R2') as trustees on the ground that s 319(1)(b)(iii) of the NLC prohibited the entry of a LHC when a registrar's caveat on the land was already subsisting. The JC dismissed a counterclaim by the third and fourth respondents to cancel the LHC on their lands. The JC found that the evidence clearly showed that the solicitors acting for the said respondents had forwarded their land titles to the appellant with the clear intention that they were to be used to secure the loans to Ikaz. The instant appeals against the JC's decision

were by the appellant and the third and fourth respondents.

Held, unanimously dismissing the appellant's appeal to enter judgment against the respondents; allowing its appeal against the allowing of R2's counterclaim and dismissing the appeals of the third and fourth respondents:

(1) As the respondents were not the borrowers of the appellant or parties to the loan agreement and had no privity of contract with the appellant, the appellant had no cause of action against them. Therefore, the JC's decision was right that the appellant was required to secure a judgment against the borrower, Ikaz, and not against the respondents/landowners to enable it to enforce its right under s 281(2) of the NLC. The respondents were not prevented from providing security by way of lien for the benefit of the third party borrower, Ikaz. Section 281 was not limited to the creation of security by way of a lien on title only for the benefit of a registered proprietor. It extended to third-party borrowers as well (see paras 21–23).

(2) The JC erred in law and fact in finding that just because of the existence of the registrar's caveat, the appellant's LHC was unlawfully registered pursuant to s 319 of the NLC. Section 319(3) of the NLC empowered the registrar to waive the prohibition on the entry of the LHC. The JC failed to appreciate that there was no evidence whatsoever by the second respondent to show that the registrar had not waived the prohibition pursuant to s 319(3) and that thereby the LHC was wrongfully entered. The evidence before the court was clear that the LHC was duly registered and by virtue of showing that the LHC existed, the appellant had sufficiently satisfied its burden to prove that the LHC was validly registered. The appellant's interest was therefore indefeasible (see paras 30–32).

(3) The JC found that the solicitors acting for, inter alia, the third and fourth respondents in the sale and purchase agreement between them and the borrower, Ikaz, had ostensible authority to surrender their original title deeds to the appellant to enable the LHC to be created on the lands to secure the loans to the borrower. The JC was not plainly wrong in finding that the appellant was entitled to rely on the said solicitor's authority to act on the respondents' behalf when he surrendered the titles to the appellant for the creation of the LHC. The counterclaim of the third and fourth respondents was therefore rightly dismissed (see paras 38, 40 & 42).

[Bahasa Malaysia summary

Responden-responden — yang terdiri daripada pemilik-pemilik tanah, pentadbir-pentadbir pemilik tanah yang telah meninggal dunia dan seorang pemegang amanah — adalah antara tujuh orang yang disaman oleh perayu di

Mahkamah Tinggi untuk penguatkuasaan kaveat-kaveat pemegang lien ('KPL') yang menyebelahi perayu untuk menjamin pinjaman yang telah diberikannya kepada pihak ketiga ('Ikaz'). Berikutan kegagalan Ikaz untuk membayar balik pinjaman-pinjaman tersebut, dan berikutan itu penggulungannya, perayu telah memasuki penghakiman ingkar terhadap tidak defendan lain, menjual tanah mereka yang tertakluk kepada KPL dan memohon untuk memasuki penghakiman terhadap responden-repsonden untuk baki kena dibayar di bawah pinjaman-pinjaman itu bagi tujuan memperoleh perintah untuk jualan tanah-tanah mereka. Mahkamah Tinggi ('PK') telah menolak permohonan perayu untuk penghakiman, memutuskan bahawa penghakiman yang perayu dikehendaki untuk memperoleh di bawah s 281(2) Kanun Tanah Negara ('KTN') adalah, dalam kes ini, terhadap Ikaz, dan bukan terhadap pihak ketiga responden-responden/pemilik-pemilik tanah tersebut. PK membenarkan tuntutan balas responden kedua untuk mengeluarkan KPL perayu atas bahagian tanah yang dipegang oleh responden kedua ('R2') sebagai pemegang amanah atas alasan bahawa s 319(1)(b)(iii) KTN melarang kemasukan satu KPL jika kaveat pendaftar atas tanah telahpun wujud. PK menolak tuntutan balas oleh responden-responden ketiga dan keempat untuk membatalkan KPL atas tanah-tanah mereka. PK mendapati bahawa keterangan jelas menunjukkan bahawa peguamcara yang bertindak untuk responden-reponden tersebut telah mengemukakan hak milik tanah mereka kepada perayu dengan niat jelas agar ia digunakan untuk menjamin pinjaman-pinjaman kepada Ikaz. Rayuan-rayuan ini terhadap keputusan PK adalah oleh perayu dan responden-responden ketiga dan keempat.

Diputuskan, sebulat suara menolak rayuan perayu untuk memasuki penghakiman terhadap responden-responden; membenarkan rayuannya terhadap tuntutan balas R2 dibenarkan dan menolak rayuan-rayuan responden-reponden ketiga dan keempat:

(1) Oleh kerana responden-responden bukan peminjam perayu atau pihak-pihak kepada perjanjian pinjaman dan tiada priviti kontrak dengan perayu, perayu tidak mempunyai kausa tindakan terhadap mereka. Oleh itu, keputusan PK adalah betul bahawa perayu dikehendaki menjamin penghakiman terhadap peminjam, Ikaz, dan bukan terhadap responden-responden/pemilik-pemilik tanah untuk membolehkannya menguatkuasakan haknya di bawah s 281(2) KTN. Responden-reponden tidak menghalang daripada memberikan jaminan melalui lien bagi manfaat peminjam pihak ketiga, Ikaz. Seksyen 281 tidak mengehadkan pembentukan jaminan melalui lien atas hak milik hanya untuk manfaat pemilik berdaftar. Ia dilanjutkan kepada peminjam pihak ketiga juga (lihat perenggan 21–23).

(2) PK terkhilaf dari segi undang-undang dan fakta apabila mendapati bahawa hanya kerana kewujudan keveat pendaftar, KPL perayu tidak sah

didaftar menurut s 319 KTN. Seksyen 319(3) KTN memberi kuasa pendaftar untuk mengetepikan larangan kemasukan KPL. PK gagal memahami bahawa tiada keterangan langsung oleh defendan kedua untuk menunjukkan bahawa pendaftar tidak mengetepikan larangan itu menurut s 319(3) dan oleh demikian KPL tersebut telah dimasukkan secara salah. Keterangan di hadapan mahkamah adalah jelas bahawa KPL telahpun didaftar dan dengan menunjukkan KPL tersebut wujud, perayu telah memuaskan secukupnya bebannya untuk membuktikan bahawa KPL telah sah didaftarkan. Kepentingan perayu dengan itu tidak boleh disangkal (lihat perenggan 30–32).

(3) PK mendapati peguamcara bertindak untuk, antara lain, responden-responden ketiga dan keempat dalam perjanjian jual beli antara mereka dan peminjam, Ikaz, mempunyai autoriti untuk menyerahkan surat ikatan hak milik asal mereka kepada perayu bagi membolehkan KPL dibentuk atas tanah-tanah tersebut untuk menjamin pinjaman-pinajaman kepada peminjam. PK jelas tidak salah kerana mendapati bahawa perayu berhak untuk bergantung kepada autoriti peguam cara untuk bertindak bagi pihak responden-responden apabila dia menyerahkan hak milik tersebut kepada perayu untuk pembentukan KPL tersebut. Tuntutan balas responden-responden ketiga dan keempat dengan itu patut ditolak (lihat perenggan 38, 40 & 42).]

Notes

For cases on third party charge, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4112–4115.

Cases referred to

Dato' Joseph Chong Chek Ah & Anor v Amcard Services Bhd [2017] 6 CLJ 151, CA (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Majlis Amanah Rakyat (MARA) v Tam Seek Hong & Ors [1994] 2 CLJ 64, HC (refd)

Perwira Habib Bank (M) Bhd v Tin Siang Sdn Bhd & Ors [1992] 3 CLJ Rep 265, HC (refd)

Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)

United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd [2009] 6 MLJ 857; [2010] 6 CLJ 204, CA (refd)

Waugh and others v HB Clifford & Sons Ltd and others [1982] 1 All ER 1095, CA (refd)

Legislation referred to

National Land Code ss 281, 281(2), 319, 319(1)(b), (3), 330

Appeal from: Civil No 22NCVC-78–10 of 2014 (High Court, Alor Setar)

Ozair bin Hyneid Tyeb (Shahrizat Rashid & Lee) for the appellant.
Mardhiyyah bt Johari (M Fairuz & Partners) for the first respondent.
Jannu Babjan (Jannu Babjan) for the second, third and fourth respondents.

Hanipah Farikullah JCA (delivering judgment of the court):

[1] There are two appeals before us as follows:

(a) Civil Appeal No K-02(NCVC)(W)-1772–08 of 2017; and

(b) Civil Appeal No K-02(NCVC)(W)-1771–08 of 2017.

[2] These appeals arise from the decision of the learned judicial commissioner ('JC') in the High Court of Alor Setar, dismissing the plaintiff's claim after a full trial against the fourth, fifth, sixth and seventh defendants and for partly allowing the fifth defendant's counterclaim against the appellant ('the 1772 Appeal').

[3] There is another related appeal before us. The sixth and seventh defendants have also filed an appeal against the JC's decision in dismissing their counterclaim ('the 1771 Appeal').

[4] For convenience, we will refer to the parties in this judgment as they were referred to in the High Court. The learned JC wrote one ground of judgment for both suits. The said ground of judgment is applicable in both appeals. Both cases are of the same facts and issues. After these introductory remarks, we must now turn to the facts.

BACKGROUND FACTS

[5] The background facts have been well set out in the judgment of the learned JC. We will only repeat in the following paragraphs the relevant facts as narrated by the learned JC in so far as they are relevant to the issues which arise for decision in these appeals.

[6] In gist, the plaintiff sued the defendants in their capacity as landowners and/or the administrator of the landowners of several pieces of land titles in the state of Kedah wherein on each of these lands, there exists a lien-holder caveat in favour of the plaintiff. The lien-holder caveats were entered by the plaintiff

pursuant to two loans granted to the borrower Ikaz Development Sdn Bhd ('the borrower'). These loans were granted for the sole purpose of financing the purchase of the defendants' lands by the borrower.

[7] Pursuant to such sale of the defendants' lands to the borrower, the original land titles were given by the landowners to their solicitors, Messrs CP Hussin & Co for the borrower to obtain the loans from the plaintiff and as security for the said loan. The original land titles were thereafter deposited with the plaintiff and the plaintiff, having possession of the original land titles, duly registered a lien-holder caveat on each land with the land office as security for the loans to the borrower.

[8] The borrower failed to regularise the account with the plaintiff and was subsequently wound up. Therefore, the plaintiff claims from the fourth, fifth, sixth, and seventh defendants to settle the said amount outstanding to the plaintiff.

[9] The trial only proceeded against the fourth, fifth, sixth, and seventh defendants as the plaintiff has obtained judgment in default against the other defendants on 25 November 2015. Subsequently, the plaintiff enforced its security pursuant to the lien-holder caveat vide an order for sale. By virtue thereof, the first defendant's land, second defendant's land, and third defendant's land were sold on 20 November 2016 respectively and as at 28 February 2017, a balance of RM34,207,894.86 was still due and owing to the plaintiff.

APPEAL 1772

The plaintiff's claim

[10] By a notice of appeal filed on 27 July 2017, the plaintiff appealed to the Court of Appeal, contending that the learned JC had erred in dismissing the plaintiff's claims.

[11] Relying on this court's decision in *Dato' Joseph Chong Chek Ah & Anor v Amcard Services Bhd* [2017] 6 CLJ 151 and *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121, the learned JC held that in fact and in law the bank is required to secure a judgment against the borrower, the third party borrower and not the defendants/landowners to enable it to enforce its right under s 281(2) of the National Land Code ('the NLC').

[12] In *Dato' Joseph Chong Chek Ah*'s case, one of the issues that arose was

whether a lien holder caveatee may realise its assets without first obtaining a judgment for the amount due to it under the lien. Delivering the judgment of the court, David Wong Dak Wah JCA (now Chief Judge of Sabah and Sarawak) held:

(a) the second appellant is not a borrower of the respondent;

(b) however, that does not preclude her from providing security by way of a lien for the benefit of a third party debtor, that is, the first appellant in this case;

(c) s 281 of the NLC, in other words, is not limited to the creation of security by way of lien on title only for the benefit of a registered proprietor. It extends to third-party borrowers as well (per Gopal Sri Ram FCJ in *United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd* [2009] 6 MLJ 857; [2010] 6 CLJ 204); and

(d) as the second appellant is not a borrower of the respondent, there is no basis in law for the respondent to sue and obtain a judgment against her for the amount due. The respondent would have no cause of action against the second appellant.

[13] It was contended for the plaintiff that although the loan agreements were entered between the borrower and the plaintiff, the defendants as landowners provided their respective lands as security vide the lien holder caveat. To enforce the lien holder caveat and to obtain an order for sale of the defendants' lands, judgment must firstly be obtained against the registered proprietor of the lands.

[14] Learned counsel for the plaintiff submitted that since the landowners are third parties in providing their land titles as security for the borrower's loan, it is natural for the loan agreement to only be entered between the borrower and the plaintiff. However, as the lien holder caveat was registered, the plaintiff will have a right to enforce the lien holder caveat.

[15] With respect to the above contention of the plaintiff, we find no merit in the argument. We reject this ground of appeal.

[16] Our starting point is s 330 of the NLC which, inter alia, provides that:

> any person or body with whom the issue document of title to any land, or any duplicate lease, has been deposited as security may, as provided in section 281, apply to the Registrar under this section for the entry of a lienholder's caveat in respect of the land or lease in question.

[17] In this present case, it is not disputed that the plaintiff made an application under s 330 of the NLC as a body with whom the issue document

of title to the land had been deposited as security for a loan by the Borrower.

[18] The creation and effect of liens are provided for by s 281 of the NLC which provides as follows:

> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security, his issue document of title or, as the case may be, duplicate lease; and that person or body —
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lienholder's caveat; and
>
> (b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder or any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, order for the sale of the land or lease.
>
> (3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and section 266 to 269 shall apply, *mutatis mutandis*, where any such application has been made as they apply where a charge applies for an order under section 256.
>
> (4) A lien-holder shall, on the written request of the proprietor or lessee, and within such reasonable period as is specified in the request, produce the issue document of title or duplicate lease at any Registry or Land Office so specified for any purpose for which it is required under any provision of this Act.
>
> (5) The costs properly incurred by any lien-holder in complying with any such request shall be payable by the proprietor or lessee on demand.
>
> (6) The provisions of sub-sections (2) to (5) shall apply to all liens, whether created before or after the commencement of this Act.

[19] The central issue for determination of this court based on the factual circumstances of the present case is whether the 'judgment' that is required to be obtained under s 281(2) of the NLC is a 'judgment' to be obtained against the borrower of the loan or against the registered proprietor of the said land.

[20] This issue was considered by the Federal Court in *Hong Leong Bank Bhd v Staghorn Sdn Bhd*. Delivering the judgment of the Federal Court, Abdul Aziz Mohamad FCJ (as he then was), inter alia, held as follows:

> [145] Subsection (1) of s 281 speaks of the registered proprietor depositing his issue document of title 'as security for a loan' but does not specify the borrower and neither does it restrict the loan to a loan to the registered proprietor. I could see no reason for construing the loan to mean only a loan to the registered proprietor. In my judgment, the loan may be a loan to a third party. That would have been my

answer to Question No 2. *Where the loan is to a third party, it must follow that under subsection (2) the judgment obtained is a judgment against the third-party borrower.* That would have been my answer to Question No 3.

[21] It is clear that the defendants are not borrowers of the plaintiff. However, that does not prevent them from providing security by way of lien for the benefit of the third party debtor that is the borrower in this case.

[22] We note that s 281 of the NLC, is not limited to the creation of security by way of a lien on title only for the benefit of a registered proprietor. It extends to third-party borrowers as well (per Gopal Sri Ram FCJ in *United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd*).

[23] The plaintiff would have no cause of action against the defendants as the defendants are not borrowers of the plaintiff. In our view, the plaintiff claim must fail as there is no privity of contract between the plaintiff and the defendants. It is not disputed that the loans were between the Borrower and the plaintiff. There is no doubt that the defendants were not parties to the loan agreements. Therefore, we confirmed the learned JC's decision that the plaintiff is required to secure a judgment against the borrower, Ikaz and not the defendant/landowners to enable it to enforce its right under s 281(2) of the NLC.

[24] We would, therefore, dismissed the plaintiff's appeal on this point.

The fifth defendant's counterclaim to expunge the lien holder caveat

[25] It is now necessary to deal with the plaintiff's appeal on the fifth defendant's counterclaim to expunge the lien holder caveat.

[26] The learned JC had allowed the fifth defendant's counterclaim to expunge the lien holder caveat on 32/72 shares held by the fifth defendant, Che Zan bt Said as trustees on behalf of her minor sisters.

[27] In allowing the fifth defendant's counterclaim in part, the learned JC held as follows:

(a) the plaintiff's lienholder's caveats were lodged in 1996 and at the time it was lodged, there was a pre-existing Registrar's caveat on the land;

(b) the effect of a Registrar's caveat is clearly provided in s 319 of the NLC and the existence of a Registrar's caveat clearly prohibits the registration of the plaintiff's lien holder's caveat; and

(c) it follows that the bank's lien holder's caveat was unlawfully registered.

[28] Learned counsel for the fifth defendant submitted that the entry of the lien holder caveat against the whole land is invalid and should be cancelled and expunged by virtue of s 319 of the NLC which prohibits subsequent entry of the lien holder caveat when a Registrar caveat is in existence and in force.

[29] The effect of a Registrar's caveat is provided in s 319 of the NLC which reads as follows:

> 319 Nature and effect of Registrar's caveats
>
> (1) A caveat under this section shall be known as a 'Registrar's caveat', and —
>
> (a) may be entered by the Registrar on the register document of title to any land in any of the circumstances specified in section 320;
>
> (b) *subject to sub-section (3), shall, so long as it continues in force, have the effect of prohibiting the registration, endorsement or entry on that document of —*
>
> (i) any instrument of dealing;
>
> (ii) any claim to the benefit of a tenancy exempt from registration; and
>
> (iii) *any lien-holder's caveat.*
>
> (2) The prohibition imposed by a Registrar's caveat shall apply to any such instrument notwithstanding that it was presented for registration before the caveat was entered, and to any such claim or lien-holder's caveat notwithstanding that the application for its endorsement or entry was received before that time.
>
> (3) The Registrar may waive the said prohibition in any case where he is satisfied that to do so would not be inconsistent with the purpose for which the caveat was entered, but, in any case, shall reject the instrument or, as the case may be, the application for endorsement or entry.
>
> (4) On rejecting any instrument or application for endorsement pursuant to this section, the Registrar shall take the like steps as if he had rejected it pursuant to section 298 or, as the case may be, 317. (Emphasis added.)

[30] It is our considered view that the learned JC erred in law and fact in finding that by virtue of the existence of the Registrar's caveat on the fifth, sixth and seventh defendants' lands, the plaintiff's lienholder's caveat was unlawfully registered pursuant to s 319 of the NLC. It is important to note that s 319(3) of the NLC empowers the Registrar to waive the prohibition set out in s 319(1)(b) of the NLC.

[31] In this regard, the learned JC erred in law and fact in failing to appreciate that there was no evidence whatsoever by the fifth defendant to demonstrate that the Registrar had not waived the prohibition in s 319(3) of

the NLC and thus wrongfully registered the plaintiff's lien holder's caveat onto the second, third, and the fourth defendants land.

[32] We therefore agreed with the plaintiff's submission that the evidence before the court is clear that the lien holder's caveat was duly registered and by virtue of showing that a lien holder's caveat exists, the plaintiff had sufficiently satisfied its burden to prove that the lien holder's caveat was validly registered. The interest of the plaintiff is therefore an indefeasible interest (see *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 (FC); *Majlis Amanah Rakyat (MARA) v Tam Seek Hong & Ors* [1994] 2 CLJ 64).

[33] After having heard the parties at length, we were of the considered opinion that this was a case in which appellate intervention was warranted.

[34] For the reason aforesaid, the learned JC's order is set aside and the plaintiff's appeal is hereby allowed.

THE 1771 APPEAL

[35] We now address the sixth and seventh defendants' appeal.

[36] The sixth and seventh defendants' appeal against the decision of the learned JC who had dismissed their counterclaim for an order to cancel the lien holder caveat entered against their respective portions by the plaintiff.

[37] Relying on the case of *Perwira Habib Bank (M) Bhd v Tin Siang Sdn Bhd & Ors* [1992] 3 CLJ Rep 265, learned counsel for the sixth and the seventh defendants submitted that the plaintiff had failed to prove that the title was deposited with them with the clear and true intent of the proprietors that the said titles are to be used as collateral for a loan taken by the borrower from the plaintiff.

[38] We find that the learned JC has made findings of fact that Messrs Hussin Che Pa, the solicitors acting on behalf of the fourth (not a party in this appeal), sixth and seventh defendants in the sale and purchase agreement between the defendants and the borrower had the ostensible authority to surrender the original title deeds to the plaintiff to enable the lands belonging to the defendants to be used as collateral by the borrower whereby lien holder caveats was duly registered by the plaintiff on both the lands.

[39] The learned JC in her judgment had referred to two letters to show the knowledge of the defendants' solicitors Hussin Che Pa. The first letter dated 22 October 1996 was prepared by Messrs Abu Zahar, Syed Mohd Fuad & Partners addressed to Cempaka Finance Bhd pertaining to the loan of

RM7.5m confirming that a lien holder caveat has been registered which was copied to various parties including Messrs CP Hussin & Co. The second letter referred to by the learned JC is a letter dated 17 January 1998, prepared by Messrs Abu Zahar, Syed Mohd Fuad & Partners addressed to Cempaka Finance Bhd informing the bank that Messrs CP Hussin & Co had confirmed that the said 14 titles had been couriered to them. The said letter again is carbon copied to the Messrs CP Hussin & Co.

[40] We are satisfied that the learned JC was not plainly wrong when she made a finding that the plaintiff was entitled to rely on Husin Che Pa's authority to act on the defendants' behalf when he surrendered the titles to the plaintiff for the creation of the lien holder's caveat.

[41] Accordingly, we would not interfere with the learned JC's finding. The Court of Appeal of England, in *Waugh and others v HB Clifford & Sons Ltd and others* [1982] 1 All ER 1095 held that a solicitor is cloaked with the ostensible authority to release and forward the said titles to the bank for the creation of the lienholder caveat despite not having the consents from the clients nor the intentions of the clients to create the lien. In this case, in view of the ostensible authority, the learned JC held that the lienholder caveat registered is valid and therefore should remain on the register.

[42] Hence, the decision of the learned JC is affirmed and the sixth and seventh defendants' appeal to cancel the lien holder caveat is dismissed.

CONCLUSION

[43] In conclusion, we made the following orders:

(a) the plaintiff's appeal to enter judgment against the fourth, fifth, sixth, and seventh defendants is dismissed;

(b) the plaintiff's appeal against the fifth defendant's counterclaim to expunge the lien holder caveat on 32/72 shares held by the fifth defendant Che Zan bt Said as trustees on behalf of her minor sisters is allowed; and

(c) the sixth and seventh defendants' appeal to cancel the lien holder caveat is dismissed.

[44] Accordingly, we made the above the order with no order as to costs for both appeals.

Order accordingly.

Reported by Ashok Kumar